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*Amendment*  
*Attorney Docket No. S63.2Q-13017-US04*

### **Remarks**

This Communication After Final is in response to the Final Office Action dated May 8, 2006. In the Final Office Action, claim 42 was objected to as being dependent upon a rejected base claim; claims 66-68 and 76 were allowed; claims 31-32, 40, 41, 43-46 were rejected under 35 USC 102(e) as being anticipated by Evans et. al. (5,709,713); and claims 31-32, 40, 41, 43-46 were rejected under 35 USC 102(e) as being anticipated by Chuter (5,725,547).

For reasons presented herein, Applicant has traversed the rejections and respectfully asserts that the claims are in condition for allowance.

The paragraph numbers below correspond to those of the Office Action.

### **Allowable Subject Matter**

Applicant acknowledges that claims 66-68 and 76 are allowed. In the Office Action claim 42 was objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. Applicant asserts that based on the arguments below, claim 42 is in condition for allowance.

### **35 USC 102**

In the Office Action, claims 31-32, 40, 41, 43-46 were rejected under 35 USC 102(e) as being anticipated by Evans et. al. (5,709,713). According to MPEP 2131, "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of*

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*California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). Instant independent claims 31 and 43 each recite “a flexible self-expanding braided tubular wall comprising at least one first *wire* ... and at least one second *wire*” (emphasis added). The Office Action stated that “[i]t is unclear why elements 14 [of Evans] are not ‘wire’” and asserted that “elements 14 and 16 [of Evans] are wire.” Applicant maintains that Evans does not anticipate instant independent claims 31 and 43 because the flat ribbon of Evans is not a wire.

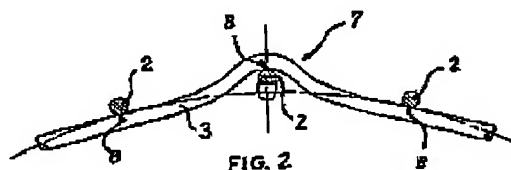
Under MPEP 2111 “pending claims must be given their broadest reasonable interpretation consistent with the specification” and that “[t]he broadest reasonable interpretation of the claims must also be consistent with the interpretation that those skilled in the art would reach.” MPEP 2111.01 explains further that “the ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e. as of the effective filing date of the patent application” and that [i]t is the use of the words in the context of the written description and customarily by those skilled in the relevant art that accurately reflects both the “ordinary” and “customary” meaning of the terms in the claims.” In addition, the recent case by the Federal Circuit, *Phillips v. AWH Corp.*, 75 USPQ2d 1321, 1326 (Fed. Cir. 2005) states that “a person of ordinary skill in the art is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification.”

Thus, reference must be made to the written description of the instant application. In the instant application the braided tubular wall 1 is composed of a first plurality of parallel spring stainless steel *wires* 2 and a second plurality of parallel spring stainless steel *wires* 3 [page 6, lines 2-3 of the first paragraph, emphasis added]. According to the specification, “[t]he *diameter* of the *wires* 2 and 3 lie within the range of 0.01 to 0.5 mms” [page 6, lines 8-9 of the

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second paragraph, emphasis added]. Thus, a *wire*, as defined in the specification and illustrated in Fig. 2 shown below, has a cross-sectional diameter such as is shown in Fig. 2.



In contrast, the specification of Evans defines the interwoven elements forming the braided tubular body as *flat ribbons* having a preferred *width* from 0.12 mm to 1.2 mm and a preferred *thickness* of 0.025 mm to 0.5 mm [col. 6, lines 14-18, emphasis added]. One of ordinary skill in the art would not consider or confuse the flat ribbon, as explicitly described in Evans, with the wire recited in instant independent claims 31 and 43.

Because Evans does not teach a wire, which is recited in instant independent claims 31 and 43, Evans does not anticipate instant independent claims 31 and 43. Therefore, instant independent claims 31 and 43 and the claims dependent therefrom are in condition for allowance.

In the Office Action, claims 31-32, 40, 41, 43-46 were rejected under 35 USC 102(e) as being anticipated by Chuter (5,725,547). Instant independent claims 31 and 43 recite "at least one first wire helically wound at a substantially constant first pitch and at least one second wire helically wound at a substantially constant second pitch different from the first pitch." The Office Action states that the windings on the stent in Chuter do not have a constant pitch yet the windings are substantially constant because "substantially" is undefined in

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applicant's specification.

The Federal Circuit, in *Deering Precision Instruments L.L.C. v. Vector Distribution Systems Inc.*, 68 USPQ2d 1716, 1721 (CA FC 2003), noted that there are several dictionary meanings of substantially and that "our cases recognize the dual ordinary meaning of this term as connoting a term of approximation or a term of magnitude [citing *Epcon*, 279 F.3d at 1031 ("The phrase 'substantially constant' denotes language of approximation, while the phrase 'substantially below' signifies language of magnitude, i.e., not insubstantial.")]." The Federal Circuit then stated that "[s]ince the term 'substantially' is capable of multiple interpretations, we turn to the intrinsic evidence [the specification] to determine which interpretation should be adopted."

Applicant asserts that when the specification, which includes the drawings, of the instant application is reviewed, it is clear that "substantially" in the instant application is used as a term of approximation. Applicant asserts that Figs. 1, 3, 4, 6 and 7 illustrate "at least one first wire helically wound at a substantially constant first pitch and at least one second wire helically wound at a substantially constant second pitch different from the first pitch" as recited in independent claims 31 and 43. Since the Office Action admits that "the first and second windings [of Chuter] do not have a constant pitch over the entire length of the stent," and the meaning of "substantially" in the instant application is a term of approximation, Chuter does not teach a substantially constant first pitch and a substantially constant second pitch. Therefore, Chuter does not anticipate instant independent claims 31 and 43.

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**Conclusion**

In light of the above comments, claims 31-32, 40-46, 66-68 and 76 are believed to be in condition for allowance. Notification to that effect is respectfully requested.

Respectfully submitted,

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